

Judge Olly Neal  
April 19, 2006

DIVISION I

CACR05-

226

NOT DESIGNATED FOR PUBLICATION

APRIL 19, 2006

HEATH HOBBS  
APPELLANT

AN APPEAL FROM THE ARKANSAS  
COUNTY CIRCUIT COURT [CR-  
2003-69]

V.

STATE OF ARKANSAS  
APPELLEE

HONORABLE DAVID G. HENRY,  
JUDGE

REVERSED AND REMANDED

In this criminal appeal from the Arkansas County Circuit Court, the trial court convicted appellant, Heath Hobbs, of delivery of a controlled substance (cocaine) and sentenced him to twenty years' imprisonment in the Arkansas Department of Correction. The court also revoked appellant's probation on three previous charges of delivery of a controlled substance (marijuana) and sentenced appellant to three concurrent five-year terms, to be served consecutively with the twenty-year sentence. For reversal, appellant does not challenge the revocation of his probated sentence; instead he asserts that he was denied his right to a jury trial. The State concedes error, and we agree. Accordingly, we reverse and remand for new trial.

At the arraignment on September 10, 2003, appellant did not have the benefit of counsel; however, appellant informed the trial court that he intended to hire an attorney. In response the court stated, "Your pre-trial is set for October 22. Your jury trial is set for November 13."

Appellant's pre-trial hearing was held on October 22, and he apparently had retained

counsel, although no one appeared on his behalf. The prosecuting attorney informed the court that appellant had hired Bill Luppen, and told the court, “[Luppen] indicated he had no discovery motions and is probably going to waive a jury trial. I don’t know if it was set[.]” The court informed the prosecutor that the trial was set for November 13, to which the prosecutor responded, “Okay. That’s right. There’s no paper in the file any more is there? Oh, he’s probably going to waive a jury trial, but I’ll make sure he knows.” The court responded, “Okay.”

On October 29, 2003, Bill Luppen entered an appearance on appellant’s behalf. During a discussion regarding the scheduling of the trial and probation–revocation hearing, the following colloquy took place:

PROSECUTING ATTORNEY:	Bill . . . Do you want a jury trial—or is that a jury trial day or a —
CASE COORDINATOR:	Uh-huh.
PROSECUTING ATTORNEY:	Do you want a jury trial or non-jury?
MR. LUPPEN:	For now, yeah.
PROSECUTING ATTORNEY:	Okay.
COURT:	Okay. All right, anything else?
MR. LUPPEN:	No, Your Honor.
COURT:	Okay.
MR. LUPPEN:	Thank you.
COURT:	Uh-huh.

On November 26, 2003, the court was set to hear the revocation. The prosecuting attorney informed the court that he did not object to Luppen’s request that the revocation be heard contemporaneously with appellant’s “bench trial” that was set for February 4. The court granted Luppen’s request. The trial was held on June 2, 2004, and it proceeded as a

bench trial. At the conclusion of the trial, the court found appellant guilty. Appellant now brings this appeal, arguing that he was denied his right to a jury trial. We agree; therefore, we reverse and remand for a new trial.

Both the United States Constitution and the Arkansas Constitution recognize the right of an accused to have a trial by jury, although that right may be waived. A waiver is the intentional relinquishment of a known right, *Burrell v. State*, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (Feb. 23, 2005), and it is the trial court's burden to ensure that, if there is to be a waiver, the defendant waives his right to a trial by jury in accordance with the Arkansas Constitution and the Rules of Criminal Procedure. *McCoy v. State*, 60 Ark. App. 306, 962 S.W.2d 822 (1998). Rule 31.2 of the Arkansas Rules of Criminal Procedure outlines that a defendant, desiring to waive his right to a trial by jury, may do so either (1) personally in writing or in open court, or (2) through counsel if the waiver is made in open court and in the presence of the defendant. The rule also requires that "a verbatim record of any proceedings at which a defendant waives his right to a trial by jury in person or through counsel shall be made and preserved." The presumption of a waiver to a jury trial from a silent record is impermissible. *Burrell v. State, supra* (citing *Williamson v. Lockhart*, 636 F. Supp. 1298, 1304 (E.D. Ark. 1986)). The record or the evidence must demonstrate that a defendant knowingly, intelligently, and voluntarily waived his right to a jury trial and anything less is not waiver. *Maxwell v. State*, 73 Ark. App. 45, 41 S.W.3d 402 (2001); *Williams v. State*, 65 Ark. App. 176, 986 S.W.2d 123 (1999). The denial of the right to a jury trial is a serious error for which the trial court should intervene and is an exception to the contemporaneous-objection rule. *McCoy v. State, supra*.

The record in this instance contains no evidence that the court informed appellant of his right to be tried by a jury. Even if he knew of this right, the record is also silent with regard to whether appellant wished to waive his right to a jury trial. It is clear that the trial

court initially set a jury trial for November 13, 2003. Nevertheless, the prosecutor informed the court at a later hearing that he believed that appellant had hired counsel and that counsel would waive appellant's right to a jury trial. However, this discussion took place only between the prosecutor and the trial court when neither appellant nor his counsel were present, clearly in violation of the requirements of Ark. R. Crim. P. 31.2. Therefore, the record fails to demonstrate that appellant knowingly, intelligently, and voluntarily waived his right to a jury trial. Consequently, we hold that appellant was deprived of his constitutional right to a trial by jury, and we reverse and remand for new trial.

Reversed and remanded.

BIRD and BAKER, JJ., agree.